

information, or other sensitive information. The Government recently notified the Defense that it is ready to start producing discovery to the Defense.

2. The Government also notified the Defense that it intended to file an ex parte motion seeking to protect all documentation that it obtained from FPMC. It attached a draft protective order that was overly broad, as it encompassed all documents and information in its possession, including those unrelated to FPMC. Attached as Exhibit 2 is the email and draft protective order that was sent by the Government to counsel for Dr. Henry on December 9, 2016.

3. Certain defendants objected to the Government's proposed protective order. Specifically, the Defense noted that the proposed protective order was overly broad because it encompassed documents and information that do not contain HIPAA information, personal identifying information, tax/financial information, or other sensitive information. Further, movants objected because the proposed protective order:

- Did not allow a defendant to possess any documentation, which is necessary to allow each defendant to participate in the defense of his/her case;
- Did not clearly spell out that documentation may be provided to experts;
- Did not allow the Defense to show documents to prospective witnesses outside of those locations set forth in paragraph (b), which is particularly problematic if counsel needs to meet with a witness where that witness works or lives; and
- Did not define "Potentially Privileged and Protected Material."

4. The Defense explained to the Government not only that its draft protective order was objectionable and hampered the ability to provide effective counsel, but also that it was improper and unnecessary to file its motion in an ex parte fashion, particularly when the

proposed protective order had already been sent to counsel for all or nearly all defendants. The Defense further explained that, under Fed. R. Crim. P. 16(d)(1), “[t]he court *may* permit a party to show good cause by a written statement that the court will inspect ex parte,” which does not imply that a motion for protective order *must* be filed ex parte. Fed. R. Crim. P. 16(d)(1) (emphasis added). The Defense suggested that the Government may file a written statement of good cause ex parte if it requires sealed communications, but that it should file its motion for all defendants to see and respond to. This practice is consistent with the Advisory Committee Notes to the 1975 Enactment of FRCP 16, which provides that:

The Committee changed subdivision (d)(1), which deals with protective orders. Proposed (d)(1) required the court to conduct an ex parte proceeding whenever a party so requested. The Committee changed the mandatory language to permissive language. A Court may, not must, conduct an ex parte proceeding if a party so requests. Thus, if a party requests a protective or modifying order and asks to make its showing ex parte, the court has two separate determinations to make. First, it must determine whether an ex parte proceeding is appropriate, bearing in mind that ex parte proceedings are disfavored and not to be encouraged. [An ex parte proceeding would seem to be appropriate if any adversary proceeding would defeat the purpose of the protective or modifying order. For example, the identify of a witness would be disclosed and the purpose of the protective order is to conceal that witness’ identity.] Second, it must determine whether a protective or modifying order shall issue.

Fed. R. Crim. P. 16.

5. Rather than litigate the propriety of filing a motion for protective order ex parte, movants file this motion for protective order.

6. Even though the Government should have segregated sensitive FPMC materials prior to Indictment so as to narrow the scope of documentation that properly should be protected under a protective order, movants do not oppose the government’s efforts to protect this sensitive information and are willing to characterize all FPMC information as being subject to protection.

7. Movants are not, however, willing to agree that other information obtained by the government during the course of its investigation is entitled to protection because such information simply does not constitute sensitive information.

8. On a related note, the Government also indicated that the Court previously entered a FRE 502(d) order to protect the attorney-client privileged nature of certain documents within the FPMC documents. While the Government should have segregated such privileged information from the FPMC materials prior to Indictment to extend 502(d) protection to such documents (or required FPMC to do so prior to receiving the same), the Government has indicated that privileged materials are substantially commingled amongst the FPMC materials. In order to expedite the Government's discovery production, Defendants are willing to allow the Court to continue 502(d) protection to those documents to which the Order previously applied, but reserve the right to challenge the privilege designation. To that end, the attached protective order provides for the same.

9. Accordingly, Defendants request that the Court enter the attached protective order to protect sensitive and privileged information contained within the FPMC documents that the Government intends to produce to the Defense.

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Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I, Jason C. Hoggan, counsel for Defendant SHAWN MARK HENRY, certify that on the 22nd day of December, 2016, I conferred with Assistant United States Attorney Katherine Pfeifle, who stated that she is opposed to this motion. In addition, I conferred with or attempted to confer with counsel for all other named defendants. Counsel for those defendants named above approved the motion, including Defendants DOUGLAS S. WON, MICHAEL BASSEM RIMLAWI, DAVID DAESUNG KIM, WILTON MCPHERSON BURT, FRANK GONZALES, JR., JACKSON JACOB, WILLIAM DANIEL NICHOLSON IV, and ROYCE VAUGHN BICKLEIN. I contacted counsel for the remaining defendants via email and/or phone message, but had received no response from them at the time of filing. I was unable to confer with Defendant MRUGESHKUMAR KUMAR SHAH, who is not currently represented by counsel and has not provided contact information.

/s/ Jason C. Hoggan

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